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No. PD-1049-19

In the
Texas Court of Criminal Appeals
At Austin

FILED
COURT OF CRIMINAL APPEALS
3/3/2020
DEANA WILLIAMSON, CLERK

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No. 14-17-00785-CR
In the Court of Appeals for the
Fourteenth District of Texas
at Houston

———♦———

ZAID ADNAN NAJAR
Appellant
V.
THE STATE OF TEXAS
Appellee

———♦———

STATE'S BRIEF ON DISCRETIONARY REVIEW

———♦———

KIM OGG
District Attorney
Harris County, Texas

JESSICA CAIRD
Assistant District Attorney
Harris County, Texas
Texas Bar No. 24000608
caird_jessica@dao.hctx.net

500 Jefferson, 6th Floor
Houston, Texas 77002
Tel.: (713) 274-5826
FAX No.: (832) 927-0180
Counsel for Appellee

ORAL ARGUMENT GRANTED

IDENTIFICATION OF THE PARTIES

Pursuant to Texas Rule of Appellate Procedure 38.2(a)(1)(A), the undersigned includes a complete list of all interested parties below:

Counsel for the State:

Kim Ogg—District Attorney of Harris County

Stacey M. Soule—State's Prosecuting Attorney

Jessica Caird—Assistant District Attorney on appeal

Sarah Neyland & Twyannette Wallace—Assistant District Attorneys at trial

Appellant or criminal defendant:

Zaid Adnan Najar

Counsel for Appellant:

Jonathan D. Landers—Attorney on appeal

Emily Shelton & Gerald Fry—Attorneys at trial

Trial Judge:

Honorable Ramona Franklin—Judge Presiding

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

The Fourteenth Court of Appeals declined application of the abuse of discretion standard to the trial court's denial of appellant's motion for new trial. It incorrectly held that the trial court had no discretion to disregard hearsay statements from appellant's trial attorneys included in the affidavits about extraneous comments jurors made after reaching their guilty verdict. Even had the affidavits not relayed hearsay, they described offhand comments two jurors made that the trial judge could reasonably decide not to credit because they lacked credibility and because the affidavits disregarded Texas Rule of Evidence 606(b)'s prohibition against relating comments made, the thought process during, or descriptions of incidents that occurred during deliberations. Lastly, the trial judge had discretion to determine that a police siren heard at a distance during deliberations did not constitute detrimental "other evidence" under Texas Rule of Appellate Procedure 21.3(f) for which the trial court had no choice but to order a new trial.

STATEMENT OF THE CASE

The State charged appellant by indictment with the felony offense of evading by motor vehicle.[1] Appellant pled not guilty to a jury, and it returned a guilty verdict.[2] The trial court assessed sentence at ten years confinement in the Texas Department of Criminal Justice, Institutional Division probated for four years.[3] Appellant filed timely written notice of appeal and a motion for new trial.[4] The trial court conducted a hearing on appellant's motion for new trial, but after the hearing, the trial judge denied it.[5] He appealed the trial court's denial of a new trial.[6]

STATEMENT OF THE PROCEDURAL HISTORY

On August 29, 2019, the Fourteenth Court of Appeals issued a published opinion that reversed the trial court's order of conviction and remanded the matter to the trial court for a new trial after it found that juror misconduct required

[1] (CR-11);
The appellate record consists of the following:
CR-Clerk's Record;
RRI-RRVI-Court Reporter's Record from July 14-18, 2017, prepared by Julia E. Johnson.
[2] (CR-72, 73).
[3] (CR-73).
[4] (CR-83-111, 119).
[5] (RRV; CR-111).

reversal under Texas Rule of Appellate Procedure 21.3(f).[7] One of the three justices on the panel published a dissent to the majority's holding in which she explained that the majority misapplied the standard of review and the applicable law.[8] She concluded that the majority erred when it failed to apply Texas Rule of Evidence 606(b) to the appellate analysis of evidence received during the new trial hearing.[9] She disagreed with the holding that a siren heard at a distance during deliberations constituted "other evidence" for purposes of applying Texas Rule of Appellate Procedure 21.3(f).[10]

The State timely petitioned for discretionary review. This Court granted the petition on both of the grounds the State raised on January 29, 2020, and ordered briefing to follow.

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[6] (Appellant's Brief at 2).
[7] *Najar v. State*, 586 S.W.3d 110, 115 (Tex. App.—Houston [14th Dist.] 2019, pet. granted).
[8] *Najar*, 586 S.W.3d at 116-118 (Christopher, J., dissenting).
[9] *Id*. at 116-117 (Christopher, J., dissenting).
[10] *Id*. at 117-118 (Christopher, J., dissenting).

ISSUES PRESENTED

1. **Was the trial judge required to believe the affidavits of defense attorneys when the State did not object to their admission, or did she have discretion to disregard their contents?**

2. **Does a police siren heard in the distance constitute a basis for which the trial court had no discretion but to grant a new trial as "other evidence" received during deliberations?**

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STATEMENT OF FACTS

I. A police officer activated his lights and siren to pull appellant over for speeding.

A police officer in a marked patrol car observed appellant speeding in a white Ford Mustang, and he noticed appellant had red and blue lights showing through the car's front windshield.[11] As soon as the officer flashed his emergency equipment, appellant turned the lights off, but he continued to speed.[12] The officer concluded that appellant used the lights to cut through a medium amount of traffic in that area.[13] Appellant traveled at speeds over 100 miles per hour in a congested

[11] (RRIII-15, 20, 21, 32).
[12] (RRIII-20-21, 32).
[13] (RRIII-22, 24).

area of Houston's Loop 610 Highway.[14] Appellant's actions caused other drivers to slam on their brakes and veer out of his way.[15]

The officer turned on his emergency lights and siren.[16] At times, the officer had to accelerate to 110 miles per hour as he caught up to appellant.[17] Appellant decelerated after the officer began to chase him, but only to about 80 miles per hour, and he continued to weave through traffic.[18]

During the two-mile chase, appellant veered across four lanes of traffic from the far left to the right lane as he passed three exits without stopping or exiting.[19] When he entered the far right lane, rather than exit, appellant cut over to the far left lane again.[20] He did not signal any of his abrupt lane changes.[21] After about 1 minute and 15 seconds to 1 minute and 45 seconds, appellant stopped on the far right shoulder.[22]

During the chase, appellant passed multiple locations where he could have stopped after the officer activated his lights and siren.[23] The officer followed appellant across the highway from the far right, to the far left, and back again,

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[14] (RRIII-22).
[15] (RRIII-24).
[16] (RRIII-21-22).
[17] (RRIII-23).
[18] (RRIII-27, 51).
[19] (RRIII-24).
[20] (RRIII-24).
[21] (RRIII-24).
[22] (RRIII-24).
[23] (RRIII-17, 18-19, 22, 25).

which would have caused a reasonable person to know the officer wanted appellant to pull over.[24] The patrol car's emergency lights were noticeable and visible at that time of night.[25] Other drivers yielded to the patrol car's emergency lights and siren during the chase, unlike appellant.[26] Moreover, appellant's actions demonstrated his knowledge of the officer's presence because as soon as he saw the officer, appellant turned off the strobe lights and he accelerated.[27] Appellant turned off his strobe lights at about the same time the officer activated his own.[28]

When the officer approached appellant's car, he noticed what he thought was a handgun, but the item later turned out to be a BB gun.[29] The officer also noticed that appellant had the blue and red strobe lights plugged into a power outlet in the car, but they no longer flashed.[30] Appellant had the lights suction cupped to the windshield of his Mustang.[31] Appellant yelled and cursed at the officer, he said he needed to get his wife from the hospital, but he did not name the hospital or make any effort to contact her about the delay.[32] Based on appellant's tenor and

[24] (RRIII-26, 75).
[25] (RRIII-32).
[26] (RRIII-32, 75).
[27] (RRIII-32).
[28] (RRIII-32, 57).
[29] (RRIII-27).
[30] (RRIII-28).
[31] (RRIII-20-21, 46)
[32] (RRIII-29).

tone, the officer did not believe him.[33] The arresting officer's testimony constituted the only evidence heard by the jury.[34]

II. Appellant filed a motion for new trial that claimed jurors committed misconduct because they considered the volume of a siren heard outside the courthouse during deliberations.

Appellant filed a motion for new trial that alleged the jury received and considered "other evidence" after deliberations began.[35] He alleged that after the jury returned its verdict, some or all of the jurors remained behind and spoke to the trial attorneys.[36] The motion claimed that a juror told the trial attorneys that the jury heard a siren outside on the street during its deliberations, and appellant argued from the comment that the jury had received "other evidence" during deliberations in the form of that siren.[37] The motion had affidavits from appellant's two trial attorneys attached as the only supporting evidence.[38]

Without evidence in the record about what appellant heard or when he noticed the officer behind him, appellant claimed a siren heard during deliberations harmed his defense.[39] Yet the State proved appellant's knowing commission of the offense based on appellant's evasive actions, his decision to turn off his strobe

[33] (RRIII-29-30).
[34] *See* (RRIII-10-76, 79).
[35] (CR-83-84).
[36] (CR-83, 84).
[37] (CR-84); *see also* (CR-93, 95).
[38] (CR-83-84, 93, 95).
[39] (CR-85); *but see* (RRIII-10-76, 77-79).

lights, and his acceleration as soon as the officer activated his emergency equipment.[40] No testimony in the record refuted appellant's evasive actions taken to avoid stopping after the officer started his lights and siren. No affirmative evidence in the record suggested that appellant was unaware of the officer or uncertain that the officer intended to pull him over. Yet appellant contended in the motion for new trial that the sound of the siren constituted evidence adverse to his defense based on his attorney's closing argument alone.[41]

a. Appellant's trial attorneys provided affidavits that described statements made by two jurors about the jury's deliberations.

The motion for new trial included affidavits from appellant's two trial attorneys.[42] The trial attorneys described the statements made by two jurors after conviction.[43] One juror described an incident that occurred during deliberations and another mentioned an opinion about how he thought appellant should have responded to the emergency equipment.[44] Both attorneys claimed that one juror said members of the jury heard a siren outside on the street during deliberations.[45] And the attorneys concluded from that comment, "the fact that they [jurors] could

[40] (RRIII-21-23, 24, 25, 26, 27, 32, 48, 51, 75).
[41] (CR-85).
[42] (CR-93, 95).
[43] (Defense's Exhibit No. H-1, H-2).
[44] (CR-93, 95).
[45] (CR-93, 95).

hear the siren from inside the jury room influenced their verdict."[46] Without attribution, the affidavits claimed, "They believed that if they could hear a siren from inside the building, that [appellant] could have heard an officer's siren inside his car."[47]

The affidavits from the attorneys reported that another juror gave his opinion that appellant should have slowed down when he heard the siren even if he did not believe the officer targeted him.[48] He no doubt reached this opinion from the evidence, which showed that appellant drove 20 to 40 miles per hour above the speed limit before and after the officer activated his emergency lights and siren.[49]

The State offered no objection to admission of the affidavits into evidence for purposes of the new trial hearing.[50] The argument addressed whether trial counsels' descriptions of a jurors' comment constituted hearsay, and whether the siren amounted to an "outside influence" from which jurors "received other evidence" during deliberations.[51] The parties addressed the exception described in Texas Rule of Evidence 606(b)(2)(A) to the general preclusion of juror testimony

[46] *Id*.
[47] (CR-93, 95).
[48] (CR-95).
[49] (RRIII-20, 22, 23, 27).
[50] (RRV-4, 5).
[51] (RRV-7-9, 14-19).

because no party may use it to impeach a verdict.[52] Unless describing "an outside influence…improperly brought to bear on any juror," inquiries into the validity of a verdict may not be proven with any evidence of a juror's statement about an incident or comment that occurred during deliberations.[53]

The defense apparently recognized the prohibition and argued the siren constituted an outside influence, which counsel equated to jurors having conducted an experiment during deliberations.[54] The prosecutor responded that the allegations in the affidavits did not describe any juror having experienced an outside influence.[55] She cited this Court's opinion in *McQuarrie v. State*,[56] which discussed whether the influence originated from a source outside the jury room, or outside the jurors themselves.[57] She concluded that when a juror heard a siren, it did not amount to an experiment and she differentiated the jurors' experiences from those of the *McQuarrie* jurors.[58] She noted that the law permitted jurors to rely on their own common sense, general experiences, and perceptions.[59] No

[52] (RRV-7-9, 14-19); *see* Tex. R. Evid. 606(b)(2)(A) (allowing a juror to testify about whether an outside influence was improperly brought to bear on any juror).
[53] *See* Tex. R. Evid. 606(b)(2)(A).
[54] (RRV-9-10).
[55] (RRV-14-15).
[56] *See McQuarrie v. State*, 380 S.W.3d 145 (Tex. Crim. App. 2012).
[57] (RRV-15).
[58] (RRV-15-16).
[59] (RRV-16).

misconduct occurred when jurors relied on their own experiences with a police siren's volume or their recollections of officer-initiated traffic stops.[60]

b. The trial judge denied the motion for new trial after she noted that jurors could rely on their own experiences, including their knowledge about how easily one might hear a police siren.

The State provided the trial judge with *McQuarrie v. State* and *Gahagan v. State* during closing statements for its contention that the statements in the affidavits did not show "an outside influence."[61] The trial judge took a break right after closing to review case law and the additional affidavit the State provided.[62] When the hearing resumed, the trial judge cited a case, and ruled that, "[j]ury members are expected to draw on their general experiences and perceptions while deliberating."[63] She concluded that most jurors had experiences with a police siren's volume, and thus she found the argument on that ground unpersuasive.[64] She denied the motion for a new trial.[65]

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[60] (RRV-16).
[61] (RRV-15); *see also McQuarrie*, 380 S.W.3d at 146-155; *Gahagan v. State*, 242 S.W.3d 80 (Tex. App.—Houston [1st Dist.] 2007, pet. ref'd).
[62] (RRV-20).
[63] (RRV-20).
[64] (RRV-20).
[65] (RRV-20-21).

SUMMARY OF ARGUMENT

The Fourteenth Court of Appeals erred when it disregarded the required standard of review on a trial court's denial of a motion for new trial.[66] The opinion contradicted binding precedent from this Court, and subverted the required standard of review to permit the trial court no discretion in the face of a Rule 21.3(f) claim that the jury received "other evidence" during deliberations. To do so, the appellate court resurrected the long-defunct contention that a trial court lacks any discretion to disbelieve or disregard an uncontroverted affidavit. The court of appeals permitted the trial judge no discretion to assess the affiant's credibility, motive, or personal knowledge about the information included, much less to disregard clearly inadmissible evidence even were the trial judge to find it unreliable.

This Court, however, disclaimed the standard espoused by the court of appeals' repeatedly over the last 15 years, including most recently in 2014 when a defendant made a nearly identical claim in *Colyer v. State*.[67] The majority improperly returned to pre-Texas Rules of Evidence case law that did not address

[66] *See Najar*, 586 S.W.3d at 114 (holding that a Rule 21.3(f) complaint requires reversal if other evidence was received that was detrimental to the defense, and refusing to apply the abuse of discretion standard generally applied to motions for a new trial).

[67] *Compare id*. *with Colyer v. State*, 428 S.W.3d 117, 126 (Tex. Crim. App. 2014) (holding the trial court could disregard juror's post-trial testimony even if wholly uncontradicted).

the competency of a juror to impeach the jury's verdict.[68] It further failed to consider applicable authority from this Court, which demanded a deferential review of the trial court's assessment of historical facts.[69] As this Court repeatedly held, a trial judge may choose to disbelieve or find lacking in credibility even uncontroverted statements when she sits as the factfinder in a motion for new trial hearing.[70]

Moreover, the court of appeals erred when it held that the trial judge had no discretion to deny a new trial when jurors heard a siren outside during jury deliberations.[71] The siren did not constitute "other evidence" detrimental to

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[68] *See* Tex. R. Evid. 606(b) (effective March 1, 1998, creating bar to inquiry into validity of verdict using any evidence from a juror about statements made or incident occurring during deliberations unless one of the two exceptions applied).

[69] *Compare Najar*, 586 S.W.3d at 114-15 (holding the uncontroverted affidavit constituted undisputed facts) (citing *Alexander v. State*, 610 S.W.2d 750, 751-3 (Tex. Crim. App. [Panel Op.] 1980); *Rogers v. State*, 551 S.W.2d 369, 370 (Tex. Crim. App. 1977) (holding the trial court erred when it refused a new trial without the State rebutting the juror's testimony with contradicting testimony)) *with Colyer*, 428 S.W.3d at 122, 126 (distinguishing uncontroverted from undisputed facts); *Charles v. State*, 146 S.W.3d 204, 210 (Tex. Crim. App. 2004) (permitting trial judge to disbelieve affidavit); *Okonkwo v. State*, 398 S.W.3d 689, 694 (Tex. Crim. App. 2013) (same); *see also* Tex. R. Evid. 606(b) (barring admission of evidence about matters that occurred during deliberations unless they described an outside influence improperly brought to bear on a juror).

[70] *See Colyer*, 428 S.W.3d at 122, 126-127 (holding trial judge had discretion to disbelieve uncontroverted statements); *Charles*, 146 S.W.3d at 210 (holding deferential standard applies to trial court's determination of historical facts based on affidavits "regardless of whether the affidavits are controverted.").

[71] *See Najar*, 586 S.W.3d at 115 ("Rule 21.3(f) mandates reversal when the jury received other evidence that was detrimental. Consequently, the trial court lacked discretion to deny appellant's motion for new trial.") (internal citations omitted) (citing *Carroll v.*

appellant. Instead, the trial judge correctly concluded that the sound of a police siren lives in the general knowledge of any juror. Jurors could rely on their own personal experience to tell them that a police siren sounds loud, and that police use them to attract people's attention. The trial judge was within her discretion to find against appellant's Rule 21.3(f) claim.

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ARGUMENT ON THE FIRST ISSUE PRESENTED

Was the trial judge required to believe the affidavits of defense attorneys when the State did not object to their admission, or did she have discretion to disregard their contents?

The court of appeals' opinion ignored longstanding precedent from this Court directly on whether a trial court could disbelieve statements in affidavits from interested parties.[72] Instead, it returned to antiquated 1977 and 1980 opinions that conflated uncontroverted statements with undisputed facts.[73] It did not apply

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State, 990 S.W.2d 761, 762 (Tex. App.—Austin 1999, no pet.); *Rogers*, 551 S.W.2d at 370).

[72] *Colyer*, 428 S.W.3d at 126-7 (holding the trial judge was entitled to disregard a juror's post-trial testimony even when uncontradicted); *Charles*, 146 S.W.3d at 210-12 (holding a trial judge had discretion to discount factual assertions in an affidavit by an interested party, and concluding the trial judge can believe all, some, or none of an affidavit); *Okonkwo v. State*, 398 S.W.3d 689, 694 (Tex. Crim. App. 2013) (holding that the appellate court must give total deference to the trial court's determination of historical facts even when based on uncontroverted affidavits).

[73] *Compare Najar*, 586 S.W.3d at 114-5 (refusing to apply the abuse of discretion standard because the prosecutor did not object to claims that jurors heard "other evidence," and that jurors relied on a siren when they found appellant guilty due to a

the standard that required evidence the trial judge acted in an arbitrary and unreasonable manner when she denied the motion for new trial before it could reverse, and it substituted its own judgment for that of the trial judge's in its reassessment of defense counsels' affidavits.[74]

I. The trial court could under Texas Rule of Evidence 606(b) disregard or disbelieve the affidavit evidence without an express objection because a juror may not impeach her verdict unless one of the exceptions apply.

a. A party need not object for the trial court to refuse to credit or consider evidence inadmissible under Rule 606(b).

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lack of contradictory evidence, so no factual dispute existed) (citing *Alexander*, 610 S.W.2d at 751-3 and *Rogers*, 551 S.W.2d at 370, which allowed impeachment of a jury's verdict with a juror's post-trial testimony) *with Colyer*, 428 S.W.3d at 122 ("Even if the testimony is not controverted or subject to cross-examination, the trial judge has discretion to disbelieve that testimony."); *Charles*, 146 S.W.3d at 210 (applying a deferential standards to trial court's determination of historical facts on uncontroverted affidavits); *Okonkwo*, 398 S.W.3d at 694 (same) (citing *Riley v. State*, 378 S.W.3d 453, 457 (Tex. Crim. App. 2012), *overruled on other grounds by Miller v. State*, 485sw3 497 (Tex. Crim. App. 2011)).

[74] *Compare Najar*, 586 S.W.3d at 115 ("Consequently, the trial court lacked discretion to deny appellant's motion for new trial" because he supported it with "uncontested affidavits provided by trial counsel" that stated, "the fact they could hear the siren from inside the jury room influenced their verdict.") *with Colyer*, 428 S.W.3d at 122 (holding a trial court abuses its discretion by denying a motion for new trial "when no reasonable view of the record could support his ruling[,]"viewed in the light most favorable to that ruling, and after presuming all reasonable, record-supported factual findings were made against the losing party); *Okonkwo*, 398 S.W.3d at 694 (applying the deferential standard which required a showing that no reasonable view of the record could support the trial court's denial of the motion for new trial to reverse); *Charles*, 146 S.W.3d at 210, 213 ("[A]n appellate court, in its review, must defer to the trial court's ruling to the extent that any reasonable view of the record evidence will support that ruling" including the trial court's clear decision to disbelieve an affiant's statements when "inconclusive, contradictory, internally inconsistent, or ambiguous.").

In reaching a decision on the new trial motion, the trial judge need not announce that she does not intend to consider inadmissible evidence that violates the bar on admission of a juror's statements in impeachment of her verdict to decide simply not to consider it. Rather, the trial judge may decline to provide any findings in support of her ruling on the new trial motion.[75]

The record before this trial court included *only* inadmissible evidence offered to impeach the jury's verdict.[76] Even without an express objection on that basis, the trial court could decide the evidence lacked credibility when offered through hearsay evidence related about what a juror may have said because the trial court decides the credibility of the evidence admitted at a motion for new trial hearing.[77]

In *McQuarrie v. State*, this Court addressed the admissibility of evidence the trial judge announced that he would not consider because it violated Rule 606(b) without addressing whether the prevailing party objected on that basis.[78] It then

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[75] Tex. R. App. P. 21.8(b).

[76] *See* (Defense's Exhibit No. H-1, H-2); *but see* Tex. R. Evid. 606(b) (prohibiting testimony or other evidence from a juror about incidents that occurred or statements made during deliberations).

[77] *See Okonkwo*, 398 S.W.3d at 695 ("The trial court, as factfinder, is the sole judge of witness credibility at a hearing on a motion for new trial with respect to both live testimony and affidavits.").

[78] *See McQuarrie v. State*, 380 S.W.3d 145, 148, n. 3 (stating the trial court determined affidavits did not show an outside influence so the court would not consider them based on the trial court's own understanding of the case law without referencing a State's objection).

considered whether the particular statements offered constituted an outside influence because the trial judge decided not to consider them on that basis.[79]

Two years later, in *Colyer v. State,* this Court granted review partially to determine whether the prevailing party in a motion for new trial had to object to inadmissible evidence before the trial court could refuse to consider it on that basis.[80] This Court held inadmissible a juror's testimony when it failed to show an outside influence, appellant thus failed to prove jury misconduct, and the trial court properly denied the motion for new trial.[81] The decision recognized that a trial court may make its own credibility determinations about the evidence offered, which would support its denial of the motion.[82]

Although the prosecutor in *Colyer* raised concerns about Rule 606(b) before the hearing began, and the trial court limited the hearing to only the Rule 606(b) exceptions, and the lower appellate court found the State's admissibility compliant unpreserved.[83] The Fort Worth Court of Appeals found that absent express objection to the testimony under Rule 606(b), cross-examination, and without

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[79] *Id*. at 149, 150-5.

[80] *Colyer v. State*, 428 S.W.3d 117, 129, n. 3 (Tex. Crim. App. 2014) (granting as the third ground for review "Must the prevailing party in a motion for new trial object to inadmissible evidence?").

[81] *See id*.

[82] *See id*. at 126.

[83] *Compare id*. at 121-22, 127 n. 56 (addressing objections before and during the hearing) *with Colyer v. State*, 395 S.W.3d 277, 282 (Tex. App.—Fort Worth 2013), *rev'd by* 428 S.W.3d 117 (Tex. Crim. App. 2014) (refusing to hold that Rule 606(b) applied to testimony that came in without objection).

controverting evidence that an outside influence changed the verdict, the State's argument on admissibility failed because it would not apply Rule 606(b) to the testimony without a contemporaneous objection.[84]

Yet in reversing the lower court's decision, this Court found, "the trial judge correctly refused to consider [the juror's] testimony or affidavit because both were inadmissible under Rule 606(b). The experienced trial judge did not abuse his discretion in denying appellant's motion for new trial based on jury misconduct."[85]

Similarly, the prosecutor here raised her concerns about violations of Rule 606(b) when she referenced the need for appellant to show an outside influence, and she argued the affidavits failed to show one.[86] Even though she did not object on that basis when appellant offered them, she brought to the trial court's attention during the hearing that an outside influence was necessary for the trial court to consider the claims.[87] Appellant's attorney also referenced the need to show an outside influence.[88] Yet no admissible or credible evidence showed that jury misconduct occurred in appellant's case, especially when the evidence did not overcome the Rule 606(b) bar on admission of the comments.[89]

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[84] *See Colyer*, 395 S.W.3d at 283.
[85] *Colyer*, 428 S.W.3d at 130.
[86] (RRV-4, 14-16).
[87] (RRV-4, 14-16).
[88] (RRV-9).
[89] *Compare* Tex. R. Evid. 606(b) *with* (Defense's Exhibit No. H-1, H-2).

b. The affidavits did not describe an outside influence improperly brought to bear on the jury, which would have excluded it from the general Rule 606(b) prohibition on considering juror evidence to impeach the verdict.

The incarnation of Rule 606(b) that emerged in 1998 prohibited any evidence from a juror or anyone else about what a juror said about incidents, matters, or statements that occurred during deliberations.[90] As this Court explained in *McQuarrie v. State*, "[j]ury deliberations must be kept private to encourage jurors to candidly discuss the law and facts, and during an inquiry pursuant to Rule 606(b), such privacy will be maintained because the court may not 'delve into deliberations.'"[91] It held, "[t]he court may not inquire as to the subjective thought processes and reactions of the jury, so jurors should continue to feel free to raise and discuss differing viewpoints without the fear of later public scrutiny."[92] Thus, "[a] Rule 606(b) inquiry is limited to that which occurs outside of the jury room and outside of the juror's personal knowledge and experience."[93]

The influence must not only be from outside the juror, but also improperly brought to bear on a juror for the Rule 606(b)(2)(A) exception to permit the evidence.[94] Information conveyed with no intention of influencing the verdict is

[90] *See McQuarrie*, 380 S.W.3d at 152, 153.
[91] *Id*. at 153.
[92] *Id.*
[93] *Id*.
[94] Tex. R. Evid. 606(b)(2)(A).

not "brought to bear" on the jury.[95] Rule 606(b) prevented a juror from testifying that the jury discussed an improper matter during deliberations.[96] To constitute an outside influence, it must have originated from a source other than the jurors themselves, and it must have included "unauthorized information or communication[.]"[97] The *Colyer* Court explained that an outside influence did not include coercion from other jurors, or discussions with other jurors about a single juror's personal knowledge.[98]

This Court contrasted the juror's efforts in *McQuarrie* when she brought in outside information in order to influence the verdict with the neutral information provided in *Colyer* about the weather and a doctor's call about a family member.[99] It cited the Advisory Committee's notes and legislative history for the Federal Rules both of which described a purposeful threat against a juror or the person's family.[100] When the outside pressures on the juror are neutral, and not intended to persuade a juror to reach a particular verdict, they are not "improperly brought to

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[95] *See Colyer*, 428 S.W.3d at 128-9.

[96] *See McQuarrie*, 380 S.W.3d at 151 (citing *Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 370 (Tex. 2000)).

[97] *See McQuarrie*, 380 S.W.3d at 151, 154 (citing *Golden Eagle*, 24 S.W.3d at 370).

[98] *Colyer*, 428 S.W.3d at 125 (citations omitted); *see also Soliz v. Saenz*, 779 S.W.2d 929, 932 (Tex. App.—Corpus Christi 1989, no pet.) ("To constitute 'outside influence,' the source of the information must be one who is outside the jury, i.e., a non-juror, who introduces the information *to affect the jury's verdict*.") (emphasis added).

[99] *Id*. at 129 (citing *McQuarrie*, 380 S.W.3d at 148).

[100] *Id*. (citing Fed. R .Evid. 606 advisory committee's note 1974; H.R.Rep. No. 650, 93d Cong., 2d Sess. 9 (1974), reprinted in 1974 U.S. Code Cong. & Ad. News 7075, 7083).

bear" on the juror.[101] This is true even if pressure ultimately influenced the particular juror in a particular way because no person placed pressure on that juror with the intent of improperly affecting the juror's verdict one way or the other.[102]

Ultimately, a siren heard in the distance was neutral and not intended to influence the jury one way or another. No one sounded the siren with the intent to change a verdict. As the dissenting justice explained, "There has been no showing that the siren was intentionally activated to influence the jury."[103] Were this Court to uphold the court of appeals' opinion, courthouses would need to soundproof jury rooms to avoid the possibility that a jury could overhear an unintentional, extraneous sound during deliberations that then had some effect on their decision, even when no one intended to influence the verdict through it.[104]

According to the court of appeals' opinion, the trial court's explicit instructions could not overcome the extraneous noise ostensibly because this case presented "a rare instance in which what occurred during deliberations [was] open for review."[105] Despite the prohibitions of Rule 606(b), the court of appeals not

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[101] *Id*.
[102] *Id*.
[103] *Najar*, 586 S.W.3d at 117 (Christopher, J., dissenting).
[104] *See id*. at 118 ("Sirens are frequently heard in downtown Houston—so frequently in fact that the burden on the judicial system would be extreme if trial courts were required to insulate the jury whenever those external sounds might be related to an issue in a case.").
[105] *Compare Najar*, 586 S.W.3d at 111-2 *with* (RRIII-95-98; CR-70).

only permitted, it instead *required* that the trial judge invade the province of the jury to consider statements made as part of jury deliberations.[106]

The court of appeals erred, however, because the contents of the affidavits described a neutral sound, never brought to bear on jurors.[107] The statements made in the two affidavits did not meet the exception in Rule 606(b) necessary to allow the evidence to be considered by the trial judge.[108] She was not required to credit the statements because they did not meet the exception to the general prohibition against allowing a juror to impeach his verdict.[109]

II. This Court no longer requires the State to controvert with additional evidence every statement in an affidavit before the trial judge may disbelieve or disregard it.

a. The trial judge had discretion to determine the historical facts, even when the proponent provided evidence to the trial court in affidavit form.

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[106] *See Najar*, 586 S.W.3d at 111-2 (claiming despite trial court's explicit instruction that "[t]his appeal presents a rare instance in which what occurred during deliberation is open for review. And because the uncontroverted evidence is the jury did not follow the court's charge and considered outside evidence that was adverse on a critical issue," the lower court reversed).

[107] *Compare id*. at 111-2, 115 (holding trial judge required to reverse based on uncontroverted statements made about jury deliberations) *with* Tex. R. Evid. 606(b) (prohibiting a juror from testifying or providing other evidence about an incident that occurred during deliberations when inquiring into the validity of a verdict because "[t]he court may not receive a juror's…statement on these matters."); *Colyer*, 428 S.W.3d at 125, 128-9 (addressing what constitutes an outside influence improperly brought to bear on a juror and confining it to something outside the personal knowledge and experience of a juror).

[108] *See Colyer*, 428 S.W.3d at 129-130; *see also* Tex. R. Evid. 606(b)(2)(A).

[109] *See id.*; *see also* Tex. R. Evid. 606(b).

This Court has long applied the deferential standard of review to a trial court's assessment of evidence in a motion for new trial hearing, even when provided in affidavit form.[110] Despite the explicit invitation issued this Court in *Charles v. State* to apply a de novo review to affidavit evidence, it declined to change the standard.[111] Instead, it held "'[a] deferential rather than a de novo standard applies to our review of the trial court's determination of historical facts when that determination is based, as here, solely upon affidavits' regardless of whether the affidavits are controverted."[112] It explained, "Of course, the trial judge is not required to believe [ ] factual statements, even when they are uncontradicted by other affidavits."[113] Rather, the trial judge as the determiner of fact can believe "all, some, or none of an affidavit" regardless of her ability "to assess the affiant's credibility solely from the cold, hard page."[114]

This Court reiterated that standard in *Okonkwo v. State* nearly ten years later again holding, "[t]he trial court, as factfinder, is the sole judge of witness credibility at a hearing on a motion for new trial with respect to both live testimony and affidavits."[115] It required the appellate court to "afford almost total deference

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[110] *See Charles*, 146 S.W.3d at 210-213 (declining to apply a de novo review to the trial court's ruling on a motion for new trial that considered only affidavit evidence).
[111] *Id*. at 210.
[112] *Id*.
[113] *Id*. at 213.
[114] *Id*.
[115] *Okonkwo*, 398 S.W.3d at 694 (citing *Riley*, 378 S.W.3d at 459).

to the trial court's findings of historical facts as well as mixed questions of law and fact that turn on an evaluation of credibility and demeanor" even when based "solely on affidavits, regardless of whether the affidavits are controverted."[116]

In *Colyer v. State*, this Court again held that "[e]ven if the testimony is not controverted or subject to cross-examination, the trial judge has discretion to disbelieve that testimony."[117] The *Colyer* opinion made clear the distinction between a statement being "uncontroverted" and one that revealed an "undisputed fact" when it explained that an undisputed fact was one that both parties agreed to or a fact about which the trial court could take judicial notice.[118]

This Court in *Evans v. State* explained that an undisputed fact is one that both parties agree is true, such as an agreed stipulation of evidence.[119] But even though the parties could agree to an undisputed fact, they could still "disagree about the logical inferences that flow[ed] from undisputed facts[.]"[120] In such a

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[116] *Id*. (citing *Riley*, 378 S.W.3d at 457, 458).

[117] *Colyer*, 428 S.W.3d at 122 (citing *Masterson v. State*, 155 S.W.3d 167, 171 (Tex. Crim. App. 2005) ("Appellant contends, however, that the trial court had no discretion to disbelieve appellant's testimony about requesting counsel before the magistrate because the State never controverted that testimony. But the trial court has discretion to disbelieve testimony even if it is not controverted."); *Evans v. State*, 202 S.W.3d 158, 163 (Tex. Crim. App. 2006); *Hernandez v. State*, 161 S.W.3d 491, 501 (Tex. Crim. App. 2005)).

[118] *Id*. (citing *Evans*, 202 S.W.3d at 163).

[119] *See Evans*, 202 S.W.3d at 163, no. 16.

[120] *Id*.

case, where there were two permissible views of the evidence, the factfinder's choice between them was not clearly erroneous.[121]

b. The prosecutor's agreement that "a conversation took place" did not create an undisputed fact that required the trial judge to accept as true the statements made and conclusions drawn in defense counsels' affidavits.

Appellate counsel during the motion for new trial hearing posited that he thought "the State agree[ed] with the factual basis of that affidavit, which is, this conversation with the jury took place. I know we have a dispute on the law. I don't know if that's correct, for the record."[122] The prosecutor responded only "[t]hat's correct" without specifying if she agreed the conversation took place, if she agreed to the factual basis of the affidavits, or if she merely disputed counsel's interpretation of the law.[123]

Any one of those interpretations could apply, but the prosecutor's comment did not stipulate to the truth of defense counsels' affidavits.[124] The statements in them did not describe an undeniable physical fact that could have amounted to an undisputed one.[125] And the trial court could have reasonably concluded from the single line that the prosecutor merely disputed appellant's claims about the law, or

[121] *See id*. (quoting *Anderson v. City of Bessemer*, 470 U.S. 564, 534 (1985)).
[122] (RRV-4).
[123] *See id*.
[124] *See id*.

she could have reasonably concluded that the comment merely asserted a conversation with the jury took place after the trial.[126] She determined the historical facts based on the ambiguous information before her.[127] The prosecutor's comment fell far short of stipulating or agreeing to the content of the conversation or the conclusions appellant drew from it.[128]

Unlike the court of appeals' holding, this Court's precedent required more than that the State fail to present counter evidence to find that "no factual dispute…was presented for the trial court's resolution."[129] Rather, the trial judge had discretion to determine that the trial attorneys' claims about a juror comment, made after rendering a guilty verdict, lacked credibility.[130] She had discretion to find them incredible in the claim that jurors heard a siren on the fifteenth floor, or

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[125] *Compare id*. *with Evans*, 202 S.W.3d at 164 (noting that the State neither assumed nor admitted the truth of the defendant's claimed fact, that it did not concern an undeniable physical fact, and thus did not amount to an "undisputed fact").

[126] *See id*.

[127] *See Okonkwo*, 398 S.W.3d at 694 (giving almost total deference to the trial court's findings of historical fact).

[128] *See* (RRV-4); *see also Colyer*, 428 S.W.3d at 122, 127 ("[T]he trial judge was not required to credit [the juror's] post-trial testimony and would not have abused his discretion by denying appellant's motion for new trial on that ground alone.").

[129] *See Najar*, 586 S.W.3d at 114 (concluding the affidavits satisfied the "receipt prong" of Rule 21.3(f) because the State did not provide contradicting evidence); *but see Colyer*, 428 S.W.3d at 122 (holding the trial judge has discretion to disbelieve uncontradicted statements); *Okonkwo*, 398 S.W.3d at 694 (holding the trial judge had discretion to disbelieve uncontroverted statements in trial counsel's affidavit); *Charles*, 146 S.W.3d at 210 (same).

[130] *See Colyer*, 428 S.W.3d at 122, 126 (permitting the trial judge to determine credibility even when submitted in an affidavit).

to disregard the conclusion that the sound influenced the jury's verdict.[131] The prosecutor disputed appellant's version in argument, but even had she not contradicted his conclusions, the trial judge was free to reach an alternate one when she sat as the factfinder.[132]

c. The court of appeals failed to presume all reasonable factual findings in favor of the trial court's ruling.

The trial court has discretion under Texas Rule of Appellate Procedure 21.8(b) to issue findings of fact in written or oral form, but it is not obliged to do so.[133] When the trial court does not issue factual findings, the appellate court "must view the evidence in the light most favorable to the trial court's ruling and presume that all reasonable factual findings that could have been made against the losing party were made against the losing party."[134]

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[131] *See Id*. at 122; *see also Okonkwo*, 398 S.W.3d at 694 (holding the appellate court erred when it did not defer to the trial court's implicit finding that trial counsel's affidavit lacked credibility); *Charles*, 146 S.W.3d at 213 (upholding the lower court's affirmance because "the trial judge could have reasonably disbelieved some or all of the affiants' statements[.]").

[132] *See* (RRV-14-16); *see also Evans*, 202 S.W.3d at 163 (when considering undisputed facts, the logical inferences flowing from those facts may differ, and the fact finder's choice between logical inferences is not clearly erroneous).

[133] Tex. R. App. P. 21.8(b) ("In ruling on a motion for new trial, the court may make oral or written findings of fact.").

[134] *Charles*, 146 S.W.3d at 208 (citations omitted); *see also Colyer*, 428 S.W.3d at 122 (viewing the evidence in the light most favorable to the ruling and presuming all reasonable factual findings supported by the record) (citing *Quinn v. State*, 958 S.W.2d 395, 402 (Tex. Crim. App. 1997) (upholding the trial judge's denial of a motion for new trial based on juror misconduct, noting that the court of appeals failed to give appropriate deference to the trial judge's credibility determinations));

This Court has consistently presumed that the trial judge found the affidavit evidence lacked credibility when she denied the motion for new trial supported only by one.[135] As it noted in *Charles v. State*, the trial judge was free to believe all, some, or none of an affidavit.[136] The implicit findings here, when viewed in the light most favorable to the ruling, showed that the trial judge disbelieved the statements in or conclusions drawn by the affidavits.[137] Appellant chose not to call the two attorneys to testify at the hearing, and thus the trial court had only the affidavits from which to determine how the attorneys knew the siren influenced the jurors.[138]

Additionally, neither attorney could remember if the trial judge was present at the time the juror made the comment.[139] The trial judge, had she been present, was free to credit her own recollections of the conversations over those of the

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Okonkwo, 398 S.W.3d at 694 (applying implied finding that counsel's affidavit lacked credibility, so the appellate court should have reviewed the remaining evidence in the light most favorable to the ruling to determine if the trial court acted arbitrarily) (citing *Riley*, 378 S.W.3d at 457, 459).

[135] *See Colyer*, 428 S.W.3d at 126-7 (holding the trial judge was not required to credit juror's post-trial testimony); *Okonkwo*, 398 S.W.3d at 694 ("Here, in viewing the evidence in a light most favorable to the trial court's ruling, the court of appeals should have deferred to the trial court's implied finding that counsel's affidavit lacked credibility[.]"); *Charles*, 146 S.W.3d at 213 (upholding the appellate court's use of implicit findings to conclude the trial judge disbelieved the affiant's statements); *see also Masterson*, 155 S.W.3d at 171 (holding the trial court had discretion to disbelieve uncontroverted testimony).

[136] *See Charles*, 148 S.W.3d at 213.

[137] *See id*. (upholding denial based on implicit findings); *see also Okonkwo*, 398 S.W.3d at 694 (same).

[138] *See* (Defense's Exhibit No. H-1, H-2).

defense attorneys.[140] Since the record does not refute her presence, the court of appeals erred when it failed to apply all reasonable implicit findings including that the trial judge may have disbelieved the defense attorneys' rendition of the juror comments based on her own personal knowledge.[141] And as the presiding trial judge of that Court, she could have reasonably been aware from her own knowledge that a siren was not loud enough for a jury to hear on the fifteenth floor of the courthouse.[142] Either implicit factual finding would have supported a ruling that denied relief without it constituting an abuse of discretion as an arbitrary or unreasonable decision.[143]

d. The trial court had the right to disregard or find lacking in credibility hearsay and hearsay within hearsay statements.

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[139] *See id*.

[140] *See Dixon v. State*, No. PD-0048-19, _ S.W.3d _, slip op. at 13 (Tex. Crim. App. Jan. 15, 2020) (holding the trial court was not required to believe the defense attorney's wife about the number of people in the courtroom because it "could rely upon its own recollections that the courtroom was full.") (citing *Okonkwo*, 398 S.W.3d at 695).

[141] *See Okonkwo*, 398 S.W.3d at 695 ("Here, in viewing the evidence in the light most favorable to the trial court's ruling, the court of appeals should have deferred to the trial court's implied finding that counsel's affidavit lacked credibility."); *Charles*, 146 S.W.3d at 213 ("…reviewing courts may impute implicit factual findings that support the trial judge's ultimate ruling on that motion [for new trial] when such implicit factual findings are both reasonable and supported in the record.").

[142] *See Dixon*, No. PD-0048-19, slip op. at 13.

[143] *See id*.; *see also Okonkwo*, 398 S.W.3d at 694.

The trial court could disregard the affidavits because they relied only on hearsay evidence, regardless of whether the prosecutor objected.[144] The Texas Supreme Court reached this conclusion in *Golden Eagle Archery, Inc. v. Jackson* when it held that the trial judge had authority to disregard inadmissible evidence even absent an objection from the opposing party.[145] In a motion for new trial seeking to establish juror misconduct, one juror sought to provide evidence about what another juror told him during deliberations.[146] Although the opposing party did not object that the testimony constituted hearsay, the Texas Supreme Court held, "the trial court may not have considered [the juror's] testimony to have been credible. It was certainly hearsay, and while no objection was made to its admission to preclude the trial court from considering it, the trial court *was nevertheless free on its own to disregard* the testimony."[147]

Similarly, the defense attorneys' renditions of a juror's comment made post-trial constituted hearsay.[148] Although the trial judge was free to consider the

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[144] *See Golden Eagle*, 24 S.W.3d at 373 (holding the trial court could have chosen not to consider inadmissible hearsay evidence about statements from a juror even without an objection from the opposing party).

[145] *See id*.

[146] *Id*. at 372-3.

[147] *Id*. at 373 (emphasis added).

[148] *Compare* (Defense's Exhibit No. H-1, H-2) (describing what a juror said after the trial concluded) *with* Tex. R. Evid. 801(d), 802 (defining hearsay as a statement made outside of testimony offered to prove the truth of the matter asserted, and generally barring admission of hearsay unless permitted under a particular statute, rule, or other authority).

hearsay in the affidavits, she could choose to disregard it, as well.[149] She could also disregard the statements because she found it less credible when an interested party transmitted the out-of-court comments to the trial court in affidavit form, rather than subjecting himself to cross-examination.[150]

This is a logical extension of the trial court's ability to decide historical facts and determine what evidence if finds credible and believable.[151] It is also a reasonable conclusion when the affidavits relied on hearsay within hearsay.[152] One juror related potentially, if this Court's analysis overcomes the conclusory aspects of the comments, what other jurors might have said, or thought, or what she thought they said or thought.[153] All of which was then filtered through the attorneys' renditions of it.[154] The statements in the affidavits depended on hearsay that caused them to be inherently unreliable, and the trial court was free to disregard the statements as hearsay-within-hearsay, as one more reason to disbelieve them.[155]

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[149] *See id*.
[150] *See Golden Eagle*, 24 S.W.3d at 373; *see also* Tex. R. Evid. 801(d), 802; *Charles*, 146 S.W.3d at 210, 213 ("Or…the trial judge may have viewed the affidavits with skepticism because they were not supported by any offer of live testimony.").
[151] *See Okonkwo*, 398 S.W.3d at 694 (affording the trial court almost total deference for historical factual determinations made based on an evaluation of credibility); *Charles*, 146 S.W.3d at 210 (applying deferential standard to trial court's factual determinations when based on affidavits).
[152] *See* (Defense's Exhibit No. H-1, H-2).
[153] *See id*.
[154] *See id*.
[155] *See Golden Eagle Archery*, 24 S.W.3d at 373.

Even before the creation of the Texas Rules of Evidence, this Court reached the same conclusion on jury misconduct claims.[156] Statements from an attorney about juror deliberations must be hearsay, and therefore failed to provide a basis for granting a new trial on jury misconduct.[157] Instead, before the current incarnation of the rules, this Court required some evidence from a juror before the defense could show the trial court erred when it denied a new trial based on jury misconduct.[158]

The trial court was free to discount the hearsay from the unnamed and unknown source.[159] The defense affidavits took no pains to identify which juror may have made the statement, or how the attorneys decided that the siren influenced the jury's verdict, which further supported the trial court's implicit decision not to credit the conclusory statements.[160]

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[156] *See Holmes v. State*, 333 S.W.2d 842, 845 (Tex. Crim. App. 1960) ("It is apparent that the statements sworn to by appellant are hearsay and do not satisfy the requirements of a motion for new trial alleging the receipt of evidence by the jury or misconduct by the jury during their deliberations"); *see also Vowell v. State*, 244 S.W.2d 214, 215 (Tex. Crim. App. 1951) (holding when matters complained of in the motion for new trial were hearsay about matters that transpired in the jury room, they were thus outside the personal knowledge of the attorney) (citing *Vyvial v. State*, 10 S.W.2d 83 (Tex. Crim. App. 1928)).

[157] *See Holmes*, 333 S.W.2d at 845; *see also Vowell*, 244 S.W.2d at 215.

[158] *See Vowell*, 244 S.W.2d at 215 (citing *Moore v. State*, 232 S.W.2d 711, 713 (1950)).

[159] *See* (Defense's Exhibit No. H-1, H-2).

[160] *See id*.; *see also Okonkwo*, 398 S.W.3d at 694 (holding trial court could have found the affidavit lacked credibility and appellate court must defer to that implicit finding).

III. The court of appeals erred when it delved into juror deliberations rather than consider how a siren would have influenced the "average hypothetical juror" because a juror cannot testify to the effect an incident had on the vote or mental processes underlying the verdict.

In addition to the above, the trial court was free to deny the motion for new trial because she could not delve into jury deliberations under Rule 606(b) to decide how it affected these jurors.[161] Instead, she had to consider how the siren would have influenced a hypothetical average juror, and thus she had to perform an objective analysis without consideration of the jury deliberations performed in this case.[162]

Yet, the court of appeals refused to apply any aspect of Rule 606(b), including its prohibition against delving into jury deliberations, without an objection raised under Rule 606(b) when appellant offered the affidavits.[163] It concluded that the siren led jurors to believe appellant heard the siren and ignored it, which mischaracterized the hearsay statements related in the affidavits, and

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[161] *See Colyer*, 428 S.W.3d at 129-30 (explaining that courts use "the objective 'reasonable person' test to decide what effect the particular 'outside influence' in a case had on a hypothetical average juror" because testimony about the specific effect on a particular jury is not permitted, and the trial court had discretion to concluded an average hypothetical juror would not have been improperly influenced to return a guilty verdict); *see also McQuarrie*, 380 S.W.3d at 154-55 (holding the trial court could not delve into deliberations even when evidence showed an outside influence, but instead had to make a determination as to whether the influence injured the complaining party under an objective analysis based on a hypothetical average juror).

[162] *See id*.; *see also McQuarrie*, 380 S.W.3d at 154-55.

[163] *Id*. at 115, n. 5.

delved into this particular jury's deliberations on the case.[164] Rather than consider how a police siren, heard in the distance, during deliberations on an evading case might affect the hypothetical average juror, the court of appeals leapt to the same faulty conclusion that this siren negatively influenced these jurors, not that it would have influenced reasonable ones.[165]

Contrary to the court of appeals' conclusion, the trial judge could have reasonably concluded a random siren heard in the distance during deliberations on an evading case would not have improperly influenced an average hypothetical juror to return a guilty verdict instead of a not-guilty one.[166] Similar to this Court's holding in *Colyer*, appellant's trial court would not have abused its discretion had it concluded that the average hypothetical juror would not be improperly

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[164] *Compare id*. at 115 ("As stated in trial counsel's affidavit, the jury's ability to hear the siren from fifteen floors above led the members of the jury to believe that appellant must have heard [the officer's] siren, but deliberately ignored it in an attempt to evade detention. This is supported by the uncontested affidavit provided by trial counsel stating, 'that the fact they could hear the siren from inside the jury room influenced their verdict.'") *with* (Defense's Exhibit No. H-1, H-2) (one juror claiming the jurors heard a siren outside on the street, and counsel concluding the fact they heard it influenced their verdict because "[t]hey believed that if they could hear a siren from inside the building, that Mr. Najar could have heard an officer's siren inside his car.").

[165] *See id*.

[166] *See Colyer*, 428 S.W.3d at 130 ("In this case, the trial judge would not have abused his discretion in concluding that the 'average hypothetical juror' would not be improperly influenced to return a guilty verdict instead of a not-guilty verdict because of radio reports of inclement weather or a doctor's telephone call concerning a child's illness.").

influenced to return a guilty verdict just from hearing a siren.[167] Nothing in the sound of a siren, heard in the distance, would have been likely to lead an objective, average, reasonable juror to find appellant guilty.[168] The trial court did not abuse its discretion by refraining from delving into the jury's deliberations or to have applied the hypothetical reasonable juror analysis to appellant's claim.[169]

IV. The court of appeals erred when it failed to apply the proper standard of review for consideration of jury misconduct claims, and when it refused to apply the deference required in an abuse of discretion review.

The court of appeal flouted the standard repeatedly set by this Court for review of a trial court's denial of a motion for new trial.[170] Rather than presume all

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[167] *See McQuarrie*, 380 S.W.3d at 153-4 (requiring an objective determination as to whether the outside influence was likely to result in injury to the complaining party by assessing the prejudicial effect on the hypothetical average juror).

[168] *See id*.; *see also Colyer*, 428 S.W.3d at 129-30.

[169] *See Colyer*, 428 S.W.3d at 130.

[170] *See id.* at 126-7 (holding the trial court had discretion to disbelieve the juror and deny the motion for new trial); *Okonkwo*, 398 S.W.3d at 694, 697 (presuming implicit findings in favor of the prevailing party including that the trial court found counsel's affidavit lacked credibility); *Holden v. State*, 201 S.W.3d 761, 763 (Tex. Crim. App. 2006) (applying deferential standard to review of trial court's credibility determinations made upon reviewing affidavits); *Charles*, 146 S.W.3d at 208 ("[S]o may a trial judge believe all, some or none of an affidavit, even though it may be difficult (if not impossible) to assess an affiant's credibility solely from the cold, hard page."); *Manzi v. State*, 88 S.W.3d 240, 243-44 (Tex. Crim. App. 2002) ("R]affirm[ing] the long-standing rule that appellate courts should show almost total deference to a trial court's findings of fact *especially* when those facts are based on an evaluation of credibility and demeanor[,]" but holding that "especially" does not mean "only" so that deference is given to resolutions of historical fact "whether or not credibility and demeanor determinations are involved."); *Salazar v. State*, 38 S.W.3d 141, 147, 149 (Tex. Crim. App. 2001) (upholding trial court's denial of a motion for new trial based on a credibility determination and reviewing decision only to decide if it was arbitrary or unreasonable).

reasonable implicit findings in favor of the prevailing party and require a showing of an arbitrary, unreasonable decision, the court of appeals stepped in to reassess the credibility determinations for the two affidavits, and from them to hold that the trial court had *no discretion* to disbelieve or disregard the statements and opinions expressed in them.[171] The court of appeals' opinion returned to antiquated case law that predated this Court's clear distinction between uncontroverted factual assertions (which the trial court retains discretion to disbelieve) and undisputed facts accepted by the parties or that was the subject of judicial notice.[172]

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[171] *Compare Najar*, 586 S.W.3d at 114-5 (holding that because the State did not disagree that a conversation with the jury took place, no factual dispute existed as to the jury's "receipt" of "other evidence", that the majority then found detrimental to appellant, and "[c]onsequently, the trial court lacked discretion to deny appellant's motion for new trial.") *with Colyer*, 428 S.W.3d at 127 (holding "the trial judge was entitled to discredit [the juror's] post-trial testimony, even if it had been wholly uncontradicted" so no abuse of discretion was shown).

[172] *Compare id*. (holding that because the State did not contest that the jury heard and discussed a siren while deliberating, or that it relied on that ability to find appellant guilty, and did not present contradictory evidence that "no factual dispute in that regard was presented for the trial court's resolution.") (*citing* Alexander, 610 S.W.2d at 751-52; *Rogers*, 551 S.W.2d at 370; *Carroll*, 990 S.W.2d at 762)) *with Colyer*, 428 S.W.3d at 126-7 (holding the trial judge could discredit juror's uncontradicted post-trial testimony when used to impeach his verdict); *Charles*, 146 S.W.3d at 210 (holding the trial judge has discretion to discount factual assertions in an affidavit from an interested witness even when uncontrovertable because they deal with mental workings of a person's mind not readily controverted); *Masterson*, 155 S.W.3d at 171 (holding trial court has discretion to disbelieve uncontroverted testimony) (citing *State v. Ross*, 32 S.W.3d 853, 855 (Tex. Crim. App. 2000)); *Evans*, 202 S.W.3d at 163 (defining the important distinction between "uncontradicted testimony" and "undisputed facts") (citing *City of Keller v. Wilson*, 168 S.W.3d 802, 815, 817 (Tex. 2005)).

The State's agreement that a conversation took place with the jury did not equate to the undisputed facts the majority claimed, namely that all the jurors heard a siren, that they considered it, that they thus received "other evidence", and that the siren was detrimental to appellant.[173] Rather, if an agreement existed, which the record does not establish, it was only that a conversation with the jurors took place, not an agreement to all the logical inferences the appellate court sought to claim flowed from it as "undisputed facts."[174] The trial court retained discretion to disbelieve the hearsay-within-hearsay statements offered by defense attorneys about what one juror believed other jurors might have said or considered.[175]

The trial court also retained discretion to disregard statements made by a juror intended to impeach her verdict under Rule 606(b). It gave the trial court discretion to disregard the statements made to the attorneys because they were not admissible when they did not describe an outside influence improperly brought to bear on the jurors.[176] The State raised the outside influence concerns and argued

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[173] *See Najar*, 586 S.W.3d at 114-5.

[174] *Compare id*. *with Evans*, 202 S.W.3d at 163 (noting that even when the parties agree to certain facts, they may still disagree about the logical inferences that flow from those undisputed facts, and thus where "two permissible views of the evidence [exist], the fact finder's choice between them cannot be clearly erroneous.") (quoting *Anderson v. City of Bessemer*, 470 U.S. 564, 574 (1985)).

[175] *See Golden Eagle*, 24 S.W.3d at 373 (holding a trial court may disregard hearsay evidence without an objection).

[176] *See Colyer*, 428 S.W.3d at 127-9 (noting the trial judge was not permitted to consider juror's testimony to impeach verdict when it did not describe an outside influence brought to bear with the intent to influence the juror as required for admission under Rule 606(b)) ("The outside pressures….were not intended to persuade a juror to

that the affidavits did not describe one.[177] Thus, the issue was before the trial judge for her to decide whether to credit the information in the affidavits when she ruled on the motion.[178]

All reasonable, implicit findings show that the trial judge did not credit the statements in the affidavits as support for the jury misconduct claim. Her decision was not arbitrary or unreasonable. Thus, the court of appeals erred when it failed to apply the correct standard of review to the trial court's denial of appellant's motion for new trial. This Court should reverse the court of appeals' decision on the State's first issue presented, and affirm the decision of the trial court.

ARGUMENT ON THE SECOND ISSUE PRESENTED

Does a police siren heard in the distance constitute a basis for which the trial court had no discretion but to grant a new trial as "other evidence" received during deliberations?

Because the court of appeals failed to apply the proper standard of review, it concluded without analysis that the jury received "other evidence" when it heard a

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decide this case in any particular manner even if they might have influenced the jury to reach a verdict more quickly.").

[177] (RRV-14-16).

[178] *See Colyer*, 428 S.W.3d at 127-9; *Golden Eagle*, 24 S.W.3d at 373 (holding trial court may, but is not required, to disregard inadmissible evidence offered without objection); *c.f. McQuarrie*, 380 S.W.3d at 151 (stating Rule 606(b) "prevents a juror

siren.[179] It reached that conclusion because the State offered no conflicting affidavits, which would have been inadmissible under Rule 606(b) had they described contradictory statements about incidents or discussion that occurred during jury deliberations.[180] Yet, as addressed above, contradicting evidence is not the standard of review. Rather, the trial court was free to conclude, even if it believed that a juror made the comment, that a siren did not amount to "other evidence received" by the jury during deliberations that was detrimental to appellant.

I. The trial court had discretion to deny appellant a new trial because a siren heard in the distance does not constitute "other evidence" under Texas Rule of Appellate Procedure 21.3(f).

The court of appeals incorrectly held that the trial court lacked discretion to deny appellant a new trial under Rule 21.3(f).[181] However, courts have long expected jurors to consider their general experience, common sense, and perceptions when reaching a verdict.[182] Moreover, this Court has long held that a

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from testifying that the jury discussed improper matters *during deliberations*.") (emphasis original) (citing *Golden Eagle*, 24 S.W.3d at 372).

[179] *See Najar*, 586 S.W.3d at 114 (holding that the "unobjected-to affidavit" satisfied the "receipt" prong of the Rule 21.3(f) test).

[180] *Compare id*. *with Colyer*, 428 S.W.3d at 122-129 (applying abuse of discretion standard to uncontradicted testimony and Rule 606(b) assessment of whether anyone improperly brought an outside influence to bear on jurors).

[181] *See id*. at 115.

[182] *See* (RRV-16); *see also McQuarrie*, 380 S.W.3d at 153 (confining an outside influence to one occurring outside the jury room and outside the juror's personal knowledge and experience); *Frazer v. State*, 268 S.W. 164, 165 (Tex. Crim. App.

juror's opinion is not "other evidence" when expressed during jury deliberations.[183] The loudness of a siren described a personal experience that courts expect jurors to rely on, and the juror at most raised an opinion about whether appellant could have heard one, which did not cause the jury to receive "other evidence" during deliberations.[184]

a. Even if believed, all this jury "received" was the sound of a siren.

The first attorney's affidavit claimed a single juror said she and other jurors heard a siren from outside on the street.[185] Even if considered despite the admissibility issues, it went no further than jurors heard a siren outside during deliberations.[186] The trial judge cannot consider how this particular incident affected deliberations in this particular case.[187] Instead, under Rule 606(b) the trial

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1924) (op. on reh'g) (holding jurors may share opinions during deliberations that they based on life experiences without it presenting new or hurtful additional testimony during deliberations).

[183] *See Frazer* , 268 S.W. at 165 (holding jury permitted to share his opinion during deliberations even when based on his own life experiences because it did not present new or hurtful new evidence); *Reagan v. State*, 124 S.W. 685, 687 (Tex. Crim. App. 1910) (holding juror's expression of opinion during deliberations did not cause the receipt of additional testimony, and instead was "simply the inference or conclusion drawn by the jury from the testimony elicited upon the trial.").

[184] *See McQuarrie*, 380 S.W.3d at 153; *Reagan*, 124 S.W. at 687.

[185] (Defense's Exhibit No. H-1, H-2).

[186] *See* (Defense's Exhibit No. H-1, H-2).

[187] *See McQuarrie*, 380 S.W.3d at 154 (assessing under an objective test the nature of the information at issue and the probable effect on a hypothetical average jury); *Colyer*, 428 S.W.3d at 129-130 (using the objective "reasonable person" test to decide what effect the particular "outside influence" in a case would have on the hypothetical

court would be expected to apply the average hypothetical juror analysis to the statement that jurors "during [ ] deliberations…heard a siren outside on the street[.]"[188] And, even before the current incarnation of Rule 606(b), this Court instructed lower courts to consider the character of the evidence based on the issues, not to consider how the specific evidence affected that particular jury.[189]

b. Jurors may share their opinions without that expression constituting "other evidence" received during deliberations.

The claim that jurors heard a siren does not show that the jury received "other evidence" while deliberating. Rather, considering the entirety of the comment, it constituted a matter of opinion, not outside evidence.[190]

This Court has long permitted jurors to draw their own conclusions and share their reasoning during deliberations without it amounting to "other evidence"

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average juror); *see also Garza v. State*, 630 S.W.2d 272, 274 (Tex. Crim. App. [Panel Op.] 1981) ("The controlling factor in deciding whether a new trial is required is the character of the evidence, in light of the issues before the jury, not the effect of such evidence on the jurors.") (citations omitted).

[188] (Defense's Exhibit No. H-1, H-2).

[189] *See Garza*, 630 S.W.2d at 274 (considering the character of the jurors comments and determining "what probable affect" it may have had on the other jurors); *see also Jones v. State*, 641 S.W.2d 545, 548 (Tex. Crim. App. [Panel Op.] 1982) (holding "that the controlling factor in deciding whether a new trial is required is the character of the evidence, in light of the issues before the jury, and not the effect of such evidence on the jurors.").

[190] *See Saenz v. State*, 976 S.W.2d 314, 322 (Tex. App.—Corpus Christi 1998, no pet.) (holding discussion on how a gun leaves powder burns did not constitute other evidence, and instead it was a permissible opinion he could share) (citing *Reagan v.*

received during deliberations.[191] Juror discussions from the differing viewpoints of life experience in argument of the contested issues do not inject additional evidence or insert new or hurtful facts into deliberations.[192] Instead, "even though divergent opinions on the subject were expressed by different members of the jury, resulting from their different experiences in life, [it] would not seem…to be the introduction of any testimony, or the bringing into the case of any new or hurtful fact."[193]

As far back as 1927, this Court distinguished opinions expressed when deliberating from new evidence raised during deliberations.[194] It noted that if the statements were expressions of a juror's opinion raised in argument for his position during deliberations, "it would not be error even if appellant should be right in the contention" that it was outside the evidence.[195] Opinions do not constitute

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State, 124 S.W. 685, 687 (Tex. Crim. App. 1910); *Frazer v. State*, 268 S.W. 164, 166 (Tex. Crim. App. 1925) (op. on reh'g)).

[191] *See id*. at 322; *see also Reagan*, 124 S.W. at 687 (holding that jurors have a right to discuss their conclusions and reasoning during deliberations); *Frazer*, 268 S.W. at 166 (holding discussions of the aspects of the case including juror's past experiences with powder burns did not bring any new or hurtful facts into deliberations).

[192] *See Frazer*, 268 S.W. at 166; *see also Reagan*, 124 S.W. at 687 ("[Jurors] have a right to discuss [how they weigh the evidence] in the jury room and give their reasons as well as to draw their conclusions and to express these…to one another" without it constituting additional testimony).

[193] *Id*.

[194] *See Borroum v. State*, 8 S.W.2d 153, 155 (Tex. Crim. App. 1927) (op. on reh'g) (holding juror's opinion did nnot add additional evidence) (citing *Frazer*, 268 S.W. at 166; *Nelson v. State*, 270 S.W. 865, 867 (Tex. Crim. App. 1925)).

[195] *Id*.

additional evidence received by the jury during deliberations.[196] The conclusory comment that jurors believed appellant could hear the siren from inside his car was a matter of opinion, not the receipt of additional evidence.[197]

c. Courts expect jurors to draw on their life experiences and common knowledge to apply it to the evidence heard at trial when resolving contested issues.

Courts have long expected jurors to draw upon their experiences and common knowledge to apply it to the factual issues before them.[198] Similarly, these jurors recognized that sirens sound loud, and they applied that opinion to the evidence before them to determine appellant's guilt.[199] The opinions did not inject new or harmful evidence into deliberations.[200] Instead, jurors considered the

[196] *See id*.

[197] *See id*. (holding expression was a matter of that juror's opinion and argument in support of it, rather than additional evidence); *see also Frazer*, 268 S.W. at 166 (permitting jurors to express divergent opinions based on life experiences without it constituting the introduction of new or hurtful testimony).

[198] *See Saenz*, 976 S.W.2d at 322 (holding discussion by three jurors about gunshot powder burns did not constituted new testimony, but was instead the expression of opinion) (citing *Zuniga v. State*, 635 S.W.2d 780, 781-2 (Tex. App.—Corpus Christi 1982, pet. ref'd) (holding jurors are expected to draw upon their own experiences and common knowledge and apply it to the facts at hand)).

[199] *See id*.; *see also Frazer*, 268 S.W. at 166 (differentiating opinion from additional evidence).

[200] *See id*.

central issues of the case, and related their opinions about the volume of a siren to the evidence they heard during the officer's testimony.[201]

The officer explained that he used his emergency lights and siren, appellant reacted by stopping his use of the suction cupped blue-and-red lights, and appellant then sped on veering to the far right, then to the far left, and finally back to the far right before he stopped.[202] Other cars yielded to the officer's emergency equipment.[203] No evidence raised a question of whether appellant heard the siren.[204] The only evidence before the jury was that he delayed stopping after the officer initiated his emergency equipment.[205]

The sound of a siren heard outside during deliberations simply did not put "other evidence" before this jury.[206] At most, it was a matter of personal knowledge and experience that informed jurors' opinions as they worked to resolve the case.[207] The trial judge did not abuse her discretion by finding that a siren,

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[201] *Compare* (Defense's Exhibit No. H-1, H-2) (claiming jurors noted the volume of a siren and opining that appellant would have heard the officer's siren) *with* (RRIII-20-27, 32, 57, 75).
[202] (RRIII-20, 21-22, 24, 26, 27, 32, 37, 57, 75).
[203] (RRIII-75).
[204] *See* (RRIII-10-76, 79).
[205] *See* (RRIII-20, 21-22, 24, 26, 27, 32, 37, 57, 75).
[206] *See Diaz v. State*, 660 S.W.2d 93, 94-5 (Tex. Crim. App. 1983) (recognizing that the mere mention of parole law by jurors constituted common knowledge not the receipt of other evidence)
[207] *See id*.

heard in the distance did not constituted "other evidence."[208] Instead, as she said, jurors "are expected to draw on their general experiences and perceptions while deliberating….they have general experience[s] of hearing sirens."[209] The trial judge retained discretion to determine that jurors had not received "other evidence," and to deny the motion for new trial on that basis.[210]

d. An extraneous noise is simply not "other evidence" under the law.

The statements in the affidavits did not show that this jury received "other evidence" after it retired to deliberate as required to necessitate a new trial under Rule 21.3(f). The majority opinion contradicted this Court's holding in *Colyer* and ultimately found without analysis that any outside extraneous noise became "other evidence" when heard by a jury during deliberations despite it being part of the general knowledge shared by jurors, despite it amounting to a matter of juror opinion, and even though it resulted from a reasonable evidentiary deduction.[211]

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[208] *See id*.; *see also McQuarrie*, 380 S.W.3d at 153 (limiting the inquiry to that which occurs outside of the jury room and outside of juror's personal knowledge and experience).

[209] (RRV-20).

[210] *See Garza*, 630 S.W.2d at 274 (holding the controlling factor on receipt of "other evidence" is the character of that evidence in light of the issues before the jury); *Jones*, 641 S.W.2d at 548 (same); *Frazer*, 268 S.W. at 166 (permitting jurors to share opinions during deliberations without it constituting "other evidence"); *Reagan*, 124 S.W. at 687 (permitting jurors to discuss reasons, deductions, and conclusions as part of deliberations without it being "other evidence").

[211] *Compare Najar*, 586 S.W.3d at 114-16 (failing to analyze the siren to determine whether it constituted "other evidence" when it held the State did not contest the

Because the court of appeals did not consider whether the extraneous sound constituted "other evidence" received during deliberations, it erred in its application of Rule 21.3(f).

II. Common knowledge and everyday experience informed jurors that a police siren sounded loud enough to garner a driver's attention, and thus jurors had not received "other evidence" detrimental to the defendant even had they overheard one.

a. Information within jurors' common experiences is not detrimental "other evidence."

The siren also did not present the jury with detrimental new evidence.[212] Instead, much like this Court's rulings on the hypothetical average juror, and even before the current incarnation of Rule 606(b) was applied in criminal cases, this

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affidavits) *with Colyer*, 428 S.W.3d at 122 (holding failure to controvert does not require the trial judge to believe testimony because uncontroverted does not equate to undisputed); *Frazer*, 268 S.W. at 166 (allowing jurors to express divergent opinions based on life experiences without it creating new or hurtful facts introduced during deliberations); *Diaz*, 660 S.W.2d at 94 (permitting jurors to refer to common knowledge during discussions without it amounting to "other evidence" received during deliberations); *Borroum*, 8 S.W.2d at 156 (distinguishing opinion shared during deliberations from admission of additional evidence).

[212] *See Bustamante v. State*, 106 S.W.3d 738, 743 (Tex. Crim. App. 2003) (addressing the two-prong test to satisfy the new trial requirement: (1) evidence must be received by the jury, and (2) it must be detrimental to the defendant) (citing *Eckert v. State*, 623 S.W.2d 359 (Tex. Crim. App. [Panel Op.] 1981), *overruled on other grounds*, *Reed v. State*, 744 S.W.2d 112 (Tex. Crim. App. 1988); *Stephenson v. State*, 571 S.W.2d 174, 176 (Tex. Crim. App. 1978)).

Court looked to the general character of that evidence, not to how it affected the particular jurors who deliberated.[213]

In this case, the incident the appellate court labeled as evidence consisted of a siren from an unknown source, a sound heard often by members of the public.[214] The character of the evidence did not establish anything detrimental to appellant. It was, at best, neutral since it provided nothing new or different from what the testimony and jurors' common experience taught them.[215] Sirens are loud. Police, firefighters, and ambulances intend for that sound to alert citizens so they will yield the right of way to an emergency vehicle or to notify a driver that police intend for the person to stop.[216] That is their intent, their design, and a fact that the

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[213] *Garza v. State*, 630 S.W.2d at 274 ("The controlling factor in deciding whether a new trial is required is the character of the evidence, in light of the issues before the jury, not the effect of such evidence on the jurors.") (citations omitted).

[214] *See Najar*, 586 S.W.3d at 118 (Christopher, J., dissenting) (noting sirens are frequently heard in Houston, and that the record did not demonstrate jurors heard a police siren not a fire or EMS siren).

[215] *See* (RRIII-20, 21-22, 24, 26, 27, 32, 37, 57, 75) (showing appellant's awareness that the officer intended to stop him, and how driver's yielded to the officer's emergency equipment); *see also Frazer*, 268 S.W. at 166 (allowing jurors to express divergent opinions); *Diaz*, 660 S.W.2d at 94 (permitting jurors to refer to common knowledge during discussions).

[216] *c.f. City of Amarillo v. Martin*, 971 S.W.2d 426, 432 (Tex. 1998) ("Under most circumstances, the lights, sirens, and distinctive coloring of an emergency vehicle make it stand out from the others[.]").

officer's testimony established when he noted that other drivers yielded the right of way to him as he chased appellant.[217]

A Rule 21.3(f) analysis looks to whether the jury: (1) received other evidence, and (2) if it was detrimental or adverse to the defendant.[218] As established above, the sound of a siren did not constitute the receipt of other evidence because the evidence established that any reasonable driver would have understood the officer meant to pull appellant over.[219] The siren was also not detrimental to appellant. A juror's reliance on his general knowledge and perceptions does not constituted detrimental new evidence.[220]

b. The court of appeals failed to consider the trial evidence in its assessment of whether the siren constituted detrimental "other evidence."

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[217] (RRIII-75); *c.f. Martin*, 971 S.W.2d at 432 (holding that civilians have an advantage over emergency vehicles in preventing a collision because the emergency vehicle is designed to stand out to keep civilian drivers from colliding with one).

[218] *See Bustamante*, 106 S.W.3d at 743 (citing *Eckert v. State*, 623 S.W.2d 359 (Tex. Crim. App. [Panel Op.] 1981), *overruled on other grounds, Reed v. State*, 744 S.W.2d 112 (Tex. Crim. App. 1988); *Stephenson*, 571 S.W.2d at 176).

[219] (RRIII-21-26, 37, 46-47, 51, 75).

[220] *See Guice v. State*, 900 S.W.2d 387, 389-90 (Tex. App.—Texarkana 1995, pet. ref'd) (finding no abuse of discretion in denying new trial when jurors relied on common experience to appellant's detriment) ("The court apparently determined after listening to [the juror's] testimony that the only material matter the jurors relied on to Guice's detriment was their own general experiences and perceptions."); *see also Saenz*, 976 S.W.2d at 322 (same); *Carter v. State*, 753 S.W.2d 432, 438 (Tex. App.—Corpus Christi 1988, pet. ref'd) (contrasting a jury's use of general experience and perception with a contrived experiment in the jury room that provided new evidence).

The court of appeals assessed whether the siren constituted detrimental "other evidence" only based on whether appellant contested the charge against him.[221] It concluded the volume of the siren was "critical to the issue of whether appellant knew he was being signaled…to pull over."[222] With no further discussion, the majority overruled the trial court's implicit factual findings that the jury received no new evidence and that the sound of a siren heard during deliberations did not constitute detrimental "other evidence" based on the totality of evidence this jury heard, as well as based on the affidavit evidence before it.[223]

No juror acted improperly, and no juror returned with knowledge otherwise unknown to herself or the other jurors.[224] A siren simply did not inject new or harmful evidence into deliberations.[225] The court of appeals erred by considering the "actual effect" rather than the hypothetical effect based on the character of a siren heard outside during deliberations, and based on the everyday knowledge

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[221] *Najar*, 586 S.W.3d at 115.

[222] *Id*.

[223] *Compare id*. at 115-116 (claiming the "uncontested affidavit" mandated reversal because a siren constituted other evidence detrimental to appellant) *with* (RRIII-21-22, 25-26, 37, 46-47, 51, 75) (establishing that appellant heard the siren and saw police lights when other drivers yielded to the patrol car, and when he took evasive actions to avoid stopping).

[224] *See* (Defense's Exhibit No. H-1, H-2).

[225] *See Ingram v. State*, 363 S.W.2d 284, 285 (Tex. Crim. App. 1962) ("No juror testified on the motion for new trial….In the absence of a showing that some new fact, hurtful to appellant, was discovered by the examination and experiment, which influenced the jury in the case, such action by the jury would not require the granting of a new trial.").

jurors carried into deliberations.[226] It failed to consider the evidence this jury heard, including that the officer did not rely only on the siren, but also on his emergency lights, which he activated at night, and which the evidence established were visible enough to cause other drivers who yielded the right of way.[227]

The court of appeals erred by finding that the siren constituted "other evidence" received by the jury that was detrimental to appellant, and by applying the wrong standard of review to the new trial decision. Accordingly, this Court should reverse the lower court and affirm the trial court's judgment.

PRAYER

The State respectfully asks this Court reverse the decision of the Fourteenth Court of Appeals, and affirm the trial court's judgment because it did not abuse its discretion when it denied the motion for new trial.

KIM OGG
District Attorney
Harris County, Texas

[226] *See Garza*, 630 S.W.2d at 274 (controlling factor for new trial is the character of the evidence, not effect on jurors); *McQuarrie*, 380 S.W.3d at 153 (allowing jurors to consider personal knowledge and experience).
[227] (RRIII-21-22, 25, 32, 37, 55, 57, 75).

/s/ *Jessica Caird*

JESSICA CAIRD
Assistant District Attorney
Harris County, Texas
500 Jefferson, 6th Floor
Houston, Texas 77002
(713) 274-5826
FAX No.: (832) 927-0180
Texas Bar No. 24000608
caird_jessica@dao.hctx.net

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Jonathan Landers
Attorney at Law
917 Franklin, Ste. 300
Houston, Texas 77002
Jlanders.law@gmail.com

Stacey M. Soule
State Prosecuting Attorney
P. O. Box 13046
Austin, Texas 78711-3046
Stacey.Soule@SPA.texas.gov

/s/ *Jessica Caird*

JESSICA CAIRD
Assistant District Attorney
Harris County, Texas
500 Jefferson, 6th Floor
Houston, Texas 77002
(713) 274-5826
FAX No.: (832) 927-0180
Texas Bar No. 24000608